

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ROBERT D. PENA,

10 Petitioner,

11 v.

12 JEFFREY A. UTTECHT,

13 Respondent.
14

CASE NO. C17-1918 RSM

ORDER ADOPTING REPORT AND
RECOMMENDATION

15
16 This matter is before the Court on the Report and Recommendation of the Honorable
17 Mary Alice Theiler, United States Magistrate Judge. Dkt. #44. Petitioner has filed objections to
18 the Report and Recommendation (“R&R”) and Respondent has filed a response in support of the
19 R&R. Dkts. #45 and #46. Petitioner filed this habeas action in part based on ineffective
20 assistance of his trial and appellate counsel. Respondent’s Answer asserted that Petitioner failed
21 to properly exhaust his state court remedies as to those claims. Petitioner has requested that the
22 Court stay this action so that he may exhaust his state court remedies or, in the alternative, extend
23 the deadline for Petitioner to respond to the Respondent’s Answer.
24

25 The R&R clearly and succinctly lays out that a stay is only available in limited
26 circumstances and the reasons that Petitioner does not qualify here. The applicable law is that:

1 [a] stay is appropriate only where (1) “the petitioner had good cause for his failure
2 to exhaust,” (2) “his unexhausted claims are potentially meritorious,” and (3)
3 “there is no indication that the petitioner engaged in intentionally dilatory
litigation tactics.” *Mitchell v. Valenzuela*, 791 F.3d 1166, 1171 (9th Cir. 2015)
(citing *Rhines*, 544 U.S. at 277-78.).

4 Dkt. #44 at 2. Focusing on the second factor, Judge Theiler thoughtfully analyzes the applicable
5 state law and concludes that state law would bar Petitioner’s claims in state court. *Id.* at 2–4.
6 Because “there is no avenue by which [P]etitioner could obtain state-court review of the claims
7 at issue here” the R&R concludes that Petitioner’s claims are not “potentially meritorious.” *Id.*
8 at 4. As such, Petitioner has failed to meet the applicable standard for issuance of a stay.

9
10 Petitioner’s objection, with respect to the second factor provide only:

11 Unexhausted claims are potentially meritorious shown by (Ground 5) being sent
12 back to remand with defense attorney Lapps testifying that (a) she has no personal
13 recollection of offering/relaying plea-deal to [Petitioner]; (b) Lapps also testifies
14 that she has no forms, notes, or documents to, prove or show, that plea-deal was
relayed to [Petitioner].

15 Dkt. #45 at 3. Petitioner does not address, in any manner, the procedural bars that form the basis
16 for Judge Theiler’s R&R. Petitioner does argue that “equitable tolling should be applied” but
17 provides no factual or legal support for his conclusory assertion. The Court does not find any
18 error in the R&R, agrees with the reasoning, and adopts the R&R.

19 The R&R also addressed Petitioner’s request for an extension of time to respond to the
20 Respondent’s Answer and a request that the Court appoint counsel. Petitioner objects to the
21 R&R’s treatment of his request for an extension of time.¹ Dkt. #45 at 5. Petitioner requested an
22 extension of 60-90 days due to a prison assault and subsequent medical care. Dkt. #42 at 3–4.
23 Finding that Petitioner had previously been granted several extensions, the R&R concluded that
24

25
26 ¹ Because Petitioner does not object to the recommendation that his request for counsel be denied,
this Court need not consider the matter. *United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th
Cir. 2003) (en banc) (de novo review is limited to those portions of the R&R objected to).

1 only a brief extension was warranted and recommended a 21-day extension from the date of the
2 Court's order. Dkt. #44 at 4. Petitioner's objections to the recommendation are unspecific and
3 Petitioner indicates that he can at least file some response within this brief extension. Dkt. #45
4 at 5 (noting ability to submit an imperfect response). Petitioner's objections provide no basis for
5 deviating from the recommendation of the R&R and the Court adopts Judge Theiler's reasoning.

6 Accordingly, having reviewed the Report and Recommendation of the Honorable Mary
7 Alice Theiler, United States Magistrate Judge, Petitioner's objections thereto, and the remainder
8 of the record, the Court finds and ORDERS:
9

- 10 1. The Court ADOPTS the Report and Recommendation (Dkt. #44).
- 11 2. Petitioner's motion to stay or extend time (Dkt. #42) is GRANTED in part and DENIED
12 in part.
 - 13 a. Petitioner's request to stay and abeyance is DENIED.
 - 14 b. Petitioner's request for appointment of counsel is DENIED.
 - 15 c. Petitioner's request for an extension of time is GRANTED in part. Within 21 days of
16 the date of this Order, Petitioner shall file any response to the Respondent's Answer.
17

18 The Clerk shall RE-NOTE the Answer (Dkt. #25) accordingly.

- 19 3. This matter is RE-REFERRED to Judge Theiler for further proceedings.
- 20 4. The Clerk is DIRECTED to send copies of this Order to the parties and to Judge Theiler.

21 Dated this 28th day of June 2019.
22

23 

24 RICARDO S. MARTINEZ
25 CHIEF UNITED STATES DISTRICT JUDGE
26